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In The
Supreme Court of the United States

A.A., *et al.*, Individually and as Representatives of a class pursuant to Fed. R. Civ. P. 23(a) and 23(b),

Cross-Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit Before Judgment

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

I. Whether the community notification provisions of New Jersey's Internet Registry Act, Public Law 2001, Chapter 167 (codified at N.J. Stat. Ann. §§ 2C:7-12 to -19), authorizing the release of sex offenders' registry information to the public via the Internet, impose punishment, such that their retroactive application violates the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.

II. Whether the government's collection and dissemination of personal information about individuals in a central registry implicates a constitutionally-cognizable privacy interest, such that New Jersey's Internet Registry Act, Public Law 2001, Chapter 167 (codified at N.J. Stat. Ann. §§ 2C:7-12 to -19), which authorizes the release of sex offenders' registry information to the public via the Internet, impermissibly impinges upon that privacy interest.

PARTIES TO THE PROCEEDING

Cross-petitioners are members of a certified class consisting of all persons found to have committed a sex offense or offenses, as defined in N.J. Stat. Ann. § 2C:7-2(b), who, pursuant to New Jersey Public Law 2001, Chapter 167 (codified at N.J. Stat. Ann. §§ 2C:7-12 to -19), now are, or in the future will be, subject to having information about them which is contained in the sex offender central registry established pursuant to N.J. Stat. Ann. § 2C:7-4 made available to the public through the Internet, or who are subject to Article IV, Section 7, paragraph 12 of the New Jersey Constitution.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	12
I. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO CONSIDER CROSS-PETITIONERS' CLAIMS THAT THE RETROACTIVE APPLICATION OF THE INTERNET REGISTRY ACT VIOLATES THE EX POST FACTO AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION	12
II. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO CONSIDER CROSS-PETITIONERS' CLAIM THAT THE GOVERNMENT'S COMPILATION AND DISSEMINATION OF THEIR PERSONAL INFORMATION IMPLICATES A CONSTITUTIONALLY-COGNIZABLE PRIVACY INTEREST UPON WHICH THE INTERNET REGISTRY ACT IMPERMISSIBLY INTRUDES	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES:

Artway v. Attorney General,
81 F.3d 1235 (3d Cir. 1996) 6

Cutshall v. Sundquist,
193 F.3d 466 (6th Cir. 1999), *cert. denied*,
529 U.S. 1053 (2000) 15

Doe v. Poritz,
142 N.J. 1, 662 A.2d 367 (1995) 5, 6, 7, 14

E.B. v. Verniero,
119 F.3d 1077 (3d Cir. 1997) 6, 7

Godfrey v. Doe,
122 S. Ct. 1062 (2002) 12, 13

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 14

Paul P. v. Verniero,
170 F.3d 396 (3d Cir. 1999) 7

United States Dep't of Justice v. Reporters' Committee for Freedom of the Press,
489 U.S. 749 (1989) 5, 14, 15, 16

Verniero v. W.P.,
522 U.S. 1110 (1998) 7

W.P. v. Verniero,
522 U.S. 1109 (1998) 7

Whalen v. Roe,
429 U.S. 589 (1977) 15

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

N.J. Const. of 1947, Art. IV, § 7, ¶ 12 ..... 2, 8

U.S. Const. amend. V 1

U.S. Const. art. I § 10 1

STATUTES:

28 U.S.C. § 1254(1) 1

N.J. Stat. Ann. § 2C:7-2(d) 4

N.J. Stat. Ann. § 2C:7-2(e) 4

N.J. Stat. Ann. §§ 2C:7-4(b)(1) and (2) 4

N.J. Stat. Ann. § 2C:7-8(c) 5

OPINION BELOW

The opinion of the United States District Court for the District of New Jersey, which is reported at 176 F. Supp.2d 274 (D.N.J. 2001), is reproduced in Petitioner's Appendix A (Pet. App. 1a to 55a). The district court's order granting in part and denying in part cross-petitioners' motion for a preliminary injunction is reproduced in Petitioner's Appendix B (Pet. App. 56a to 57a).

JURISDICTION

The order of the district court was entered on December 6, 2001. Cross-petitioners filed a notice of appeal in the Court of Appeals for the Third Circuit on December 10, 2001. This Court's jurisdiction is involved pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause of the United States Constitution applicable to the States provides: "No State shall . . . pass any . . . ex post facto law." U.S. Const. art. I § 10.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

New Jersey's Internet Registry Act, New Jersey Public Law 2001, Chapter 167, codified at N.J. Stat. Ann.

§§ 2C:7-12 to-19, is reproduced in Petitioner's Appendix C (Pet. App. 58a to 64a).

STATEMENT OF THE CASE

Procedural History

On October 15, 2001, cross-petitioners, all of whom have been convicted of sex offenses in New Jersey and are subject to registration and community notification pursuant to Megan's Law, filed this action in federal district court challenging the constitutionality of the Internet Registry Act and Article IV, Section 7, Paragraph 12 of the New Jersey Constitution, and seeking declaratory and injunctive relief. Shortly after filing the complaint, cross-petitioners moved for a preliminary injunction against implementation of the Internet Registry Act, which was scheduled to take effect on January 1, 2002, asserting three grounds for relief under the United States Constitution. First, they argued that the Act violated their right to privacy in their home addresses, in that it authorized the disclosure of that protected information to those with no need for it. Second, they argued that the Act violated their right to privacy in the totality of the information collected in the registry, in that it authorized the disclosure of vast amounts of personal information, compiled by the government, to those with no need for the information. And third, they argued that the Act violated the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution, because it imposed additional punishment on cross-petitioners after they had already served their sentences for crimes committed long ago. Cross-petitioners also moved for class certification, for a sealing order, and for leave to proceed under pseudonyms.

On December 6, 2001, the district court issued its opinion and order, granting in part and denying in part the application for a preliminary injunction. The district court ruled for cross-petitioners solely on their first claim, that the Act violated their right to privacy in their home addresses, and entered an order enjoining the State from including in the Internet registry cross-petitioners' home addresses, but ruled for the petitioners with respect to the other claims, thus allowing the State to otherwise proceed with the registry. The court also certified a class with four sub-parts, and granted cross-petitioners' motions for a sealing order and for leave to proceed under pseudonyms. On December 10, 2001, cross-petitioners filed a notice of appeal from that portion of the district court's order which denied their motion for a preliminary injunction, and sought a stay pending appeal from the district court. On December 13, 2001, the district court denied cross-petitioners' application for a stay pending appeal. Cross-petitioners then moved in the United States Court of Appeals for the Third Circuit for a stay, which was denied on December 21, 2001. The petitioners filed a notice of cross-appeal on December 19, 2001.

The cross-appeals have been fully briefed in the Third Circuit and oral argument has been scheduled for September 2002. Nevertheless, on or about May 27, 2002, petitioners filed a petition for a writ of certiorari before judgment, seeking review of the district court's decision partially enjoining implementation of the Internet Registry Act. Cross-petitioners are submitting a separate response in opposition to that petition. However, cross-petitioners also submit this conditional cross-petition for a writ of certiorari before judgment and request that, in the event that this Court grants petitioners' application, it also

review the district court's holdings that the retroactive application of New Jersey's Internet Registry Act does not violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution and does not impermissibly impinge upon registrants' privacy interest in the compilation of the information contained in the registry.

Statement of Facts

New Jersey is the home of "Megan's Law." And for eight years, the courts of the Third Circuit and New Jersey have grappled with the constitutional questions New Jersey's Megan's Law presents. As first enacted in 1994, the law required all persons convicted of a sex offense to register with the police and provide their name, physical description, home address, employment or school address, vehicle used and license plate number, and the offense involved, for inclusion in a central registry. N.J. Stat. Ann. §§ 2C:7-4(b)(1) and (2). Registrants whose conduct was repetitive and compulsive were required to verify their addresses with law enforcement quarterly, while other registrants were required to do so annually. N.J. Stat. Ann. § 2C:7-2(e). All registrants were required to notify law enforcement of any change of address. N.J. Stat. Ann. § 2C:7-2(d).

The law further authorized notification to the public of this information, according to a three-tiered system. For those deemed a low risk of re-offense (Tier 1), pursuant to a risk assessment scale developed by the Attorney General, the registry information would be provided solely to local law enforcement agencies likely to encounter the individuals. For those deemed a moderate risk of re-offense (Tier 2), in addition to Tier 1 notices, the police were authorized to provide the information to organizations in the

community, including schools, religious institutions and youth organizations, working with vulnerable populations. For those whose risk of re-offense was deemed high (Tier 3), notification was authorized, in addition, for members of the public likely to encounter the offenders. N.J. Stat. Ann. § 2C:7-8(c). The law, in its original form, did not afford registrants the opportunity to contest their tier designation or the scope of notification.

In *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995), the New Jersey Supreme Court upheld Megan's Law against constitutional challenge. However, in order to do so, the Court made two significant adjustments to the statutory scheme. First, in order to avoid a conflict with the Ex Post Facto and Double Jeopardy Clauses of the United States and New Jersey Constitutions, and offenders' right to privacy under both Constitutions, it construed the scope of notification authorized for those offenders deemed to be of moderate risk of re-offense – those in Tier 2 – to incorporate a "likely to encounter" standard based upon geography. *Doe,* 662 A.2d at 381. The New Jersey Supreme Court found that offenders had a privacy interest cognizable under the New Jersey and United States Constitutions in their home addresses, as well as in the "totality of the information" contained in the registry. *Id.* at 408-13.[1]

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[1] In so holding, the court relied upon this Court's decision in *United States Dep't of Justice v. Reporters' Committee for Freedom of the Press*, 489 U.S. 749 (1989). Although *Reporters' Committee for Freedom of the Press* involved the statutory meaning of privacy for purposes of exemptions to the Freedom of Information Act, the New Jersey Supreme Court found its reasoning applicable to the question of whether the Constitution protects against the government's disclosure of information that it has compiled about an individual. *See Doe*, 662 A.2d at 409-11.

Second, in order to avoid a conflict with offenders' due process rights under both Constitutions, it required the State to provide offenders with notice of their tier designation and proposed scope of notification, and an opportunity for judicial review before notification was actually undertaken. *Id.* at 382-83. With these two changes incorporated, the New Jersey Supreme Court found that the statute was constitutional.

In *Artway v. Attorney General,* 81 F.3d 1235 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit had its first opportunity to review the constitutionality of Megan's Law. Finding that only the challenge to the registration provisions was ripe at that time, the Third Circuit held that the provisions were consistent with the United States Constitution, including the Ex Post Facto and Double Jeopardy Clauses. In so holding, the Court of Appeals relied largely, as had the New Jersey Supreme Court, on the fact that the statute was not excessive in relation to its remedial purpose of public safety. Then, in *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), the Third Circuit reviewed the constitutionality of Megan's Law notification. Once again, in upholding the statute against constitutional challenge, including under the Ex Post Facto and Double Jeopardy Clauses, the Court of Appeals relied on the limiting construction given the statute by the New Jersey Supreme Court, pursuant to which notification was provided solely to those with a need for the information based upon the likely to encounter standard. *See E.B.*, 119 F.3d at 1098. Further fine-tuning the Megan's Law system, the Third Circuit also held that,

consistent with offenders' procedural due process rights under the United States Constitution, the State must bear the burden of persuasion in establishing an offender's tier level and the appropriate scope of notification, and must meet this burden by clear and convincing evidence. *See E.B.*, 119 F.3d at 1108, 1111. Cross-petitions for a writ of certiorari from this Court for review of the Third Circuit's decision were denied. *See W.P. v. Verniero,* 522 U.S. 1109 (1998); *Verniero v. W.P.*, 522 U.S. 1110 (1998).

The litigation continued. In *Paul P. v. Verniero*, 170 F.3d 396 (3d Cir. 1999), the Court of Appeals faced two different issues than had previously been presented, concerning whether the notification provisions of Megan's Law violated registrants' right to privacy under the United States Constitution. The registrants contended that the notification provisions violated their right to privacy in their home addresses and in the totality of the information compiled in the registry, as the New Jersey Supreme Court had found in *Doe v. Poritz*. In resolving the former issue, the Court of Appeals acknowledged that offenders' privacy interests in their home addresses merited constitutional protection. *See Paul P.*, 170 F.3d at 404. Nevertheless, balancing those interests against the State's interest in providing the information to those with a need for it, the Third Circuit upheld the statute. The Court of Appeals declined to decide the registrants' claim that the notifications provisions also implicated their right to privacy in the totality of the information contained in the registry, finding that, even if such an interest were cognizable under the Constitution, it too would be outweighed by the State's interest in providing the information to those likely to encounter an offender. *See id.* at 404.

Consistent with the foregoing decisions of the Third Circuit and the Supreme Court of New Jersey, for seven years Megan's Law notification in New Jersey has been provided by the police to those likely to encounter an offender, based upon geographic proximity. In the year 2000, however, tired of the restraints on notification imposed by the courts, the Legislature and the voters of New Jersey approved an amendment to the state Constitution to facilitate notification to the general public via the Internet.[2]

The amendment does not, by its terms, create a system of public disclosure of the personal information it describes; rather, it authorizes the Legislature to create such a system. Accordingly, the Legislature passed, and on July 23, 2001, the Governor signed into law, the Internet Registry Act, Public Law 2001, Chapter 167, which has been codified at N.J. Stat. Ann. § 2C:7-12 *et seq.* The Act authorizes the creation of a central sex offender registry, available to the public through the Internet "without limitation." P.L. 2001, Ch. 167 § 9. Through the registry, any person across the globe with Internet access may

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[2] The amendment, which now constitutes Article IV, Section 7, paragraph 12 of the New Jersey Constitution of 1947, provides that:

> Notwithstanding any other provision of this Constitution and irrespective of any right or interest in maintaining confidentiality, it shall be lawful for the Legislature to authorize by law the disclosure to the general public of information pertaining to the identity, specific and general whereabouts, physical characteristics and criminal history of persons found to have committed a sex offense.

N.J. Const. of 1947, Art. IV, § 7, ¶ 12. The constitutionality of the amendment itself is also at issue in cross-petitioners' suit. However, that issue is not before the Court at this time, since it was not raised in the motion for a preliminary injunction.

obtain the following information about registrants who have been deemed to be a moderate or high risk of re-offense, and for whom a court has ordered community notification: the offender's name and any aliases used; any sex offense committed with a brief description; the offender's assessed risk of re-offense; the offender's age, race, sex, date of birth, height, weight, hair, eye color and distinguishing marks; a photograph of the offender; a description of the offender's car and license plate number; and the street address, zip code, municipality and county in which the offender resides. P.L. 2001 Ch. 167 § 2(g). Moderate risk (Tier 2) offenders whose sole offense was an incest or statutory rape offense are exempted from the registry, as are Tier 2 juveniles who have committed only one offense. *Id.* §§ 2(d)(1), (2), (3).

Thus, the Internet registry authorized by the Act differs from the system of community notification that has been in place for the past seven years in at least two critical respects. First, it does away with the restriction on notification to those likely to encounter an offender that has been a signature feature of New Jersey's Megan's Law since its inception. In stark contrast to the prior system of community notification, pursuant to the Act, anyone in the entire world who has access to the Internet may obtain information about any offender included in the registry. The Internet registry provides such global notification despite the fact that affordable technology presently exists that could restrict access through the use of a password system to only those with a need for the information. Pet. App. at 45a-46a, n.25.

Second, the Act does away with the distinction between moderate (Tier 2) and high risk (Tier 3) offenders. Whereas pursuant to the prior system of community

notification, only Tier 3 offenders were subject to notification to members of the public likely to encounter them, in addition to local organizations and schools, under the Act the same maximum level of disclosure is authorized for both groups of offenders, despite substantial differences in risk levels among members of the two groups.

The Internet registry supplements rather than replaces the current system of notification. Thus, in addition to the registry, the police will continue to undertake community notification, providing information about offenders to those who are likely to encounter them, subject to the very same limitations that have been in place for years. Pet. App. at 52a. Thus, for those who are within the geographic zone for which the courts have approved notification, the Internet registry provides access to information already provided by the police.

The limited system of community notification that has been in place for the past seven years has inflicted severe consequences on sex offenders. As demonstrated by the forty-three certifications and affidavits submitted to the district court and the Third Circuit by cross-petitioners describing effects of Megan's Law notification, dated from 1995 to the present, these people have been subjected to acts of vigilantism (or lived in constant fear of such acts), harassment, and discrimination in housing and the workplace. For example, cross-petitioner A.E. lost his job and apartment and became homeless after the community notification flyer containing his information was published in a major newspaper. Within days of community notification, registrant F.G. received a threatening letter. The next day someone attempted to murder him by firing five shots from a high caliber handgun into the downstairs front windows of his home.

As cross-petitioners demonstrated through the affidavits and certifications of numerous expert psychologists, submitted to the district court and Third Circuit, community notification has also interfered with offenders' ability to obtain and benefit from treatment, which has been shown to be an important factor in reducing recidivism. On a practical level, offenders are frequently forced out of their homes and jobs, making consistent participation in treatment a logistical and financial challenge. In addition, because of the stress caused by notification, offenders frequently become depressed and anxious, and are consequently less able to benefit from treatment. Thus, they are unable to become rehabilitated and reintegrated into the community. This is particularly the case for juvenile offenders like cross-petitioner A.C., for whom widespread notification may make readjustment to the community impossible, according to the experts consulted by cross-petitioners.

Nevertheless, with the Internet Act, the State declared that even a moderate risk offender (of which there are over 2,300 in New Jersey, as compared to approximately 150 high risk offenders) must be subjected to notification to Internet users across the globe. According to recent estimates, approximately 420 million persons worldwide have access to the Internet, including 104 million persons in the United States alone. The State posted its Internet registry on its website on February 21, 2002.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO CONSIDER CROSS-PETITIONERS' CLAIMS THAT THE RETROACTIVE APPLICATION OF THE INTERNET REGISTRY ACT VIOLATES THE EX POST FACTO AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION.

As the Court evidently recognized in granting a writ of certiorari to the Ninth Circuit to review *Godfrey v. Doe*, *cert. granted*, 122 S. Ct. 1062 (2002), No. 01-729, the constitutionality of the retroactive application of states' community notification statutes is of great public importance. This is true not only from the perspective of the states that seek to enforce these statutes retroactively, but also from the perspective of the thousands of former offenders whose lives are changed forever when they become subject to such laws. Since the Court has never before granted certiorari in a case concerning the constitutionality of states' sex offender registration and community notification laws, *Godfrey* presents the Court with an important opportunity to address whether such laws are punitive and thus subject to the limitations of the Ex Post Facto and Double Jeopardy Clauses. Like the respondents in *Godfrey*, cross-petitioners contend that these measures are punitive, and therefore may not constitutionally be applied to persons who committed their crimes before the measures were enacted.

This case should be heard with *Godfrey* because, while the statutes at issue in the two cases both authorize worldwide (and thus excessive) Internet notification, they differ in significant respects. For example, whereas Alaska's

Internet registry includes registrants' place of employment, New Jersey's Internet registry does not – although that information continues to be provided door-to-door to those in geographic proximity to an offender. In addition, Alaska includes a wider range of persons in its Internet registry. Whereas Alaska places all of its sex offenders on its website, New Jersey includes only those categorized as moderate or high risk offenders. Thus, the Court's decision in *Godfrey* will not necessarily decide the legal question presented in this case or provide relief to cross-petitioners. Accordingly, the Court should grant certiorari to consider cross-petitioners' claim that the New Jersey statute also imposes punishment, notwithstanding its differences from the Alaska statute.

In addition, this case should be heard at the same time as *Godfrey* because plaintiffs have assembled a record that, although not complete – by virtue of the fact that the district court's decision was rendered upon a motion for a preliminary injunction – reflects New Jersey's more than seven years of implementing Megan's Law. This record, which includes over forty-three certifications and affidavits describing the effects of community notification on registrants, establishes that they are frequently subjected to acts of vigilantism, harassment, and discrimination in housing and the workplace, and routinely suffer from anxiety and depression. The record also includes certifications from expert psychologists establishing that notification significantly impedes registrants' ability to benefit from treatment and become rehabilitated. Together, this evidence provides considerable support for cross-petitioners' argument that notification imposes punishment, evidence that has not been assembled in *Godfrey*. This evidence will be particularly helpful to the Court in

deciding whether unlimited notification imposes an "affirmative disability or restraint," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963), a critical question for purposes of determining whether the notification statutes impose punishment in violation of the Ex Post Facto and Double Jeopardy Clauses.

II. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO CONSIDER CROSS-PETITIONERS' CLAIM THAT THE GOVERNMENT'S COMPILATION AND DISSEMINATION OF THEIR PERSONAL INFORMATION IMPLICATES A CONSTITUTIONALLY-COGNIZABLE PRIVACY INTEREST UPON WHICH THE INTERNET REGISTRY ACT IMPERMISSIBLY INTRUDES.

In the event that the Court grants a writ of certiorari to consider the issue raised by petitioners, cross-petitioners request that the Court also consider their claim that the State's compilation and disclosure of their personal information in the sex offender registry implicates a constitutionally-cognizable privacy interest upon which the Internet Registry Act impermissibly intrudes. The district court ruled against cross-petitioners on this argument. Pet. App. at 46a to 51a.

The Court should grant certiorari on this issue for three reasons. First, it is intertwined with the two other questions presented in this case, so that the Court should consider all three issues in the event that it grants a writ of certiorari in this matter. Second, there is a conflict between a state court of last resort and a United States Court of Appeals on this question. *Compare Doe v. Poritz*, 662 A.2d at 408-13 (finding, pursuant to *Reporters' Committee for Freedom of the Press*, that the government's

compilation and disclosure of information from various sources, even if separately available in public records, implicates a privacy interest protected by the United States Constitution) with *Cutshall v. Sundquist*, 193 F.3d 466, 480-81 (6th Cir. 1999) (rejecting argument under *Reporters' Committee for Freedom of the Press* that the Constitution recognizes a privacy interest in information compiled by the government), *cert. denied*, 529 U.S. 1053 (2000).

Third and finally, the Court should grant a writ of certiorari to consider this issue in light of its enormous public importance. As the Court anticipated in *Whalen v. Roe*, 429 U.S. 589 (1977), there is an undeniable "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." *Id.* at 605. The government has a great deal of information in its possession about each of us, not merely those convicted of a criminal offense. For example, various branches of the government have in their files not only the names and home addresses of most individuals, but also their photographs, income tax returns, medical information, professional licenses, voter registration, political donations, gambling wins or losses, vehicle registration and license plate numbers, and travel patterns. Although some of this information may be contained in publicly-available records, absent a government-sponsored registry compiling it, the information would not otherwise be available in one easily-accessible location. As this Court recognized in *Reporters' Committee for Freedom of the Press*, writing of the separate pieces of information compiled in "rap sheets," "the very fact that [government] funds have been spent to prepare, index, and maintain these criminal history files demonstrates that

the individual items of information in the summaries would not otherwise be 'freely available' either to the officials who have access to the underlying files or to the general public." 489 U.S. at 764. Thus, there is a tremendous practical difference between pieces of information remaining scattered, even in public records, and their being compiled in one central location by the government for public consumption.

Whether the compilation and disclosure of such information by the government implicates a constitutionally-cognizable privacy interest is unquestionably a question of great public importance. For, if the Constitution does not recognize such an interest, then, absent a specific statutory prohibition against doing so, the government could assemble the information described above and make it available to the public without limitation, including via the Internet. This Court has never resolved whether such action implicates a privacy interest recognized by the Constitution: although the Court stated in *Reporters' Committee* that the right to privacy protected by the Constitution is "not the same" as the right to privacy recognized under the Freedom of Information Act, 489 U.S. at 762 n.13, the Court did not explain then – and has never since – how these rights differ. Accordingly, in the event that the Court grants certiorari on any of the issues presented in this matter, it should utilize the opportunity to address the lingering, and critically important, question of whether the government's disclosure, without restriction, of information it has compiled about its citizens implicates a constitutionally-cognizable privacy interest.

CONCLUSION

For the foregoing reasons, in the event that the Court grants the State's petition for a writ of certiorari before judgment, the Court also should consider cross-petitioners' claims that the retroactive application of New Jersey's Internet Registry Act violates the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution, and that the Internet Registry Act impermissibly impinges upon registrants' constitutional privacy interest in the compilation of their personal information contained in the registry.

Respectfully submitted,

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